



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1668/2013

In the matter between:

CHIEF NKAMANE MKHATSHWA

Plaintiff

and

THAMI XABA

1ST Respondent

NDIPHETHE DLAMINI & 15 OTHERS

2–17TH Respondent

Neutral citation: *Chief Nkamane Mkhathshwa vs Thami Xaba & Others (1668/2013) [SZHC 244] [2013] (1st November 2013)*

Coram: **MAPHALALA PJ**

Heard: 29th October 2013

Delivered: 1st November 2013

For Applicant: Miss W. Ndlela

For Respondent: Mr Q. Nzima

Summary: (i) Application under a Certificate of Urgency for an *interim* interdict;

- (ii) The Respondents has raised three points *in limine* that the matter is not urgent and that this court has no jurisdiction to hear the matter and lastly that there are disputes of fact which cannot be reconciled on the papers.
- (iii) The court dismisses the Application mainly on the ground that there are glaring disputes of fact which cannot be determined in Application proceedings.

JUDGMENT

[1] On the 29 October, 2013 the Applicant filed before this court an Application under a Certificate of Urgency against the 1st Respondent with 18 other persons for an order in the following terms:

- “1. Dispensing with the time limits, forms and service prescribed by the Rules of this Honourable Court and hearing this matter as one of urgency;
- 2. Condoning Applicants non-compliance with the Rules of court;
- 3. Interdicting the Respondents from calling meetings at Elwandle area;
- 4. Granting a *rule nisi* calling upon the Respondents to show cause on a date to be determined by the honourable court why an order in the following terms should not be made final:
 - 4.1 Interdicting and restraining the Respondents or anyone else from constructing and/or continuing with the construction of any structures on the remaining extent of

the farm “The Peebles” Block (North) No.9, situate in the Manzini District, Swaziland until permission to so construct has been granted by the lawful authority of the area;

4.2 That the Royal Swaziland Police ensure that the order sought is effectively complied with and assist in the service of the said order;

5. Costs of the Application in the event the Application is opposed.

6. Further and/or alternative relief.”

[2] The Application is founded on the affidavit of one Ben Sibandze who is an “indvuna” of the Applicant setting on the background of the matter. Further a Confirmatory Affidavit of one Timothy Velabo Mtsetfwa is also filed with pertinent annexures.

[3] On the other hand the Respondents oppose the granting of the above orders and has filed an Answering Affidavit of one Mr. Pitoli Shabangu who have raised 7 (seven) points *in limine*.

[4] When the matter appeared before me on 29th October, 2013 the attorneys of the parties made submissions on the points *in limine* raised as follows:

- (i) improper service;
- (ii) disputes of fact;

- (iii) lack of jurisdiction;
- (iv) lack of interdict requirements;
- (v) lack of urgency;
- (vi) lack of authority;
- (vii) defective affidavit.

[5] In my assessment of the arguments of the parties on the main I am in total agreement with the Respondents on a number of fronts. Firstly, it is abundantly clear that there are disputes of facts in this matter that cannot be reconciled on the papers. I agree with the arguments of the Respondent in paragraphs 3.2, 3.2.1, 3.2.2, 3.2.3 and 3.2.4 of the Heads of Arguments of Mr. Ndzima for the Respondent to effect.

[6] These disputes cannot be decided in these proceedings as oral evidence ought to be led on questions of customary law. It is my view this difficulty gives rise to the third point *in limine* that this court lacks jurisdiction to hear this matter. This Application relates to a cheftancy dispute over land on Swazi nation land. There are various points raised by the Respondent showing this state of affairs. This Application stands to be dismissed on this point.

[7] The second point I wish to address is that of urgency. The Applicant avers the following in the Founding Affidavit of his “indvuna” at paragraph 3.1 thereof:

“The matter is urgent and cannot be afforded a hearing in due course by virtue of the fact that soon the King will commission the water party

hence the chief and the “libandla” will not be able to engage the Respondents during this time. Hell will break loose and by the time the “incwala” ceremony comes to an end, there will be irreparable damage already occasioned to Applicants as the warning advanced by Applicant proves to have fallen on deaf ears.”

[8] In argument before me the attorney for the Applicant insisted that urgency has been proved in accordance with Rule 6(25) (a) & (b) of the Rules of this Court. When pressed on the inadequacy of this paragraph she argued that there are other parts of the said affidavit where urgency is mentioned from the facts.

[9] In my view the Applicant has dismally failed to prove the requirements Rule 6(25) of this court which require a litigant to state explicitly the circumstances which make the matter urgent and why he cannot be afforded substantial relief at a hearing in due course.

[10] Another major plan flaw in this Application is that the Applicant has not filed a Founding Affidavit he merely refers to the affidavit of the “indvuna” but in that affidavit it is not stated where he derived the power to attest to that evidence. Strictly speaking the Applicant has not filed any papers in this case.

[11] Furthermore, I am in agreement with the submission of Mr. Ndzima for the Respondent in respect of the other points *in limine* more particularly that

Applicant has failed to prove a clear right because his position in that area is highly contested that he belongs to another area and not the one in dispute.

[12] In the result, for the foregoing reasons the points *in limine* are upheld with costs.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE